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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TERRY PAUL MARTIN, Defendant and Appellant.	F055892 (Super. Ct. No. F04904473-6) **O P I N I O N**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Gary D. Hoff, Judge.

Christine Vento, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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[*] Before Vartabedian, Acting P.J., Levy, J., and Cornell, J.

A jury convicted appellant, Terry Paul Martin, of committing a lewd and lascivious act on a child under the age of 14 (Pen. Code, § 288, subd. (a)),[1] and found true allegations that appellant had suffered a prior felony conviction which subjected him to sentencing under both the "three strikes" law (§§ 667, subds. (b)-(i); 1170.12) and the "one strike" law (§ 667.61). The court imposed a sentence of 50 years to life, consisting of a term of 25 years to life under the one strike law, with the determinate portion of the term doubled under the three strikes law.

On appeal, this court, in case No. F048297, reversed the true findings under the one strike and three strikes laws and remanded the matter to the trial court for further proceedings. On remand, the court imposed a prison sentence of eight years, representing the upper term for the instant offense. The instant appeal followed.

Appellant's appointed appellate counsel has filed an opening brief in which she summarizes the pertinent facts, with citations to the record, raises no issues, and asks that this court independently review the record. (*People v. Wende* (1979) 25 Cal.3d. 436.) Appellant, apparently in response to this court's invitation to submit additional briefing, has submitted a letter in which he asserts that the imposition of the upper term based on facts found by the sentencing court violated his right to trial by jury. In addition, appellant has filed in this court, in case No. F057716, a petition for writ of habeas corpus (the petition), in which he raises various other claims and asks that this court consider the petition as a brief in the instant appeal. We will do so.

BACKGROUND

In our opinion in case No. F048297, we stated: "In 1994, defendant pleaded guilty to one count of violating Hawaii Revised Statutes section 707-731, sexual assault in the second degree." In that appeal, this court: (1) held the evidence presented at appellant's trial was insufficient to prove that the Hawaii prior qualified as a strike under California's

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[1] All statutory references are to the Penal Code.

three strikes or one strike laws; (2) stated further that when an appellate court reverses a prior conviction allegation due to insufficiency of evidence, the proper procedure is to remand the matter for retrial of the allegation; (3) reversed "[t]he jury's findings that defendant suffered a prior serious felony conviction within the meaning of the Three Strikes law ... and a prior serious felony conviction within the meaning of the One Strike law"; and (4) remanded for "further proceedings."

On remand, trial was set for July 14, 2008 (July 14). On that date, the defense moved to dismiss the prior conviction allegations. The trial court concluded as follows: The prosecution did not provide to the defense the documentary evidence upon which the prosecution proposed to prove the prior conviction allegations until July 13, 2008. Appellant would not have adequate time to "investigate and challenge the authenticity of [those] documents" if forced to proceed to trial on July 14. However, under section 1382, appellant was entitled to have trial on the prior conviction allegations commence no later than July 14, unless the prosecution could establish good cause to continue the trial, and the prosecution had not done so. Therefore, "the only remedy [was] to dismiss the proceedings under Penal Code [s]ection 1382 for denial of a speedy trial right." Accordingly, the court ruled, "the defendant's motion by way of a sanction for discovery failure, the motion to dismiss the case as it relates to the trial by jury on his prior felony conviction is granted."

On August 4, 2008, appellant appeared for sentencing, at which time the court stated, inter alia, as follows: "[T]he court cannot say, based upon [the instant offense] alone, that the aggravated term would be warranted .... Although the prior conviction in Hawaii cannot be used for enhancement purposes, based upon, first, the appellate opinion, and second, the failure of any finding by a jury as to the truth of ... that allegation that he suffered a prior conviction, notwithstanding that, the court has the ability to consider a criminal history. And based upon the documents previously received and based upon, even by Mr. Martin's own words, the fact that there has been a

conviction, although he believes it was somehow forged or coerced, there is the fact of the conviction. And noting what the conviction was for, the court finds that factor alone would be enough to impose an aggravated term."

DISCUSSION

As indicated above, appellant first argues that the imposition of the upper term sentence based on facts found by the sentencing court, but not by a jury, violated his federal constitutional right to trial by jury. There is no merit to this contention.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), the United States Supreme Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*. at p. 490.) The high court reaffirmed this rule in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and again in *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*).

Cunningham, in addition, held that the version of California's determinate sentencing law (DSL) then in effect violated a defendant's Sixth Amendment right to a jury trial because "circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt ...." (*Cunningham*, *supra*, 549 U.S. at p. 288.) The high court also concluded that the middle term prescribed in the former DSL, not the upper term, was the relevant statutory maximum for *Apprendi* purposes.

In response to *Cunningham* the Legislature amended the former DSL by urgency legislation effective March 30, 2007. (Stats. 2007, ch. 3, § 2, pp. 4-6; see also *People v. Sandoval* (2007) 41 Cal.4th 825, 836, fn. 2.) The amended DSL remedied the constitutional infirmities in the former DSL by eliminating the middle term as the presumptive term and by allowing the trial court to exercise broad discretion in selecting the lower, middle or upper term based on reasons stated on the record. As amended, section 1170 now provides: "When a judgment of imprisonment is to be imposed and the

statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court .... The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected ...." (§ 1170, subd. (b) (§ 1170(b)).)

These amendments were suggested by the *Cunningham* court itself as a means of remedying the constitutional infirmities in the DSL. As the *Cunningham* court observed, a system which permits judges to exercise broad discretion within a statutory range "encounters no Sixth Amendment shoal." (*Cunningham*, *supra*, 549 U.S. at p. 294.) Or, as the Third District Court of Appeal put it, the *Cunningham* court suggested that "California could comply with [Sixth Amendment] jury-trial constitutional guarantee while still retaining determinate sentencing, by allowing trial judges broad discretion in selecting a term within a statutory range, thereby eliminating the requirement of a judge-found factual finding to impose an upper term." (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992.)

In the instant case, the sentencing at issue occurred in August 2008, more than 16 months after the effective date of the DSL amendments discussed above. The court did not mention the 2007 *Cunningham*-inspired reform of the DSL when it pronounced sentence, but we presume it was aware of, and applied, the appropriate decisional and statutory law. (*People v. Coddington* (2000) 23 Cal.4th 529, 644, disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Accordingly, we conclude that the court exercised the broad discretion it had under section 1170(b), as amended effective March 30, 2007, in selecting the upper terms, and, as indicated above, the court stated on the record its reasons for doing so. Thus, appellant was sentenced in accordance with the requirements of section 1170(b), as amended, and therefore his upper term sentences did not violate his right to jury trial under *Apprendi*, *Blakely* and *Cunningham*.

Appellant also argues, as best we can determine, as follows: (1) his conviction was the result of jury tampering and "false transcripts"; (2) Corcoran State Prison officials denied him access to photocopying services in preparing his brief in the instant appeal; (3) his appellate counsel was constitutionally ineffective in filing a *Wende* brief; and (4) the sentencing court impermissibly relied on the victim's age in imposing the upper term.

Claims (1), (2) and (3) above are based, to the extent appellant provides any basis for them at all, on matters outside the record. Therefore, we need not, and will not, consider them. (*People* v. *Barnett* (1998) 17 Cal.4th 1044, 1183 ["our review on a direct appeal is limited to the appellate record"].) Claim (1) is not properly before us for the additional reason that California law prohibits a direct attack upon a conviction in a second appeal after a limited remand for resentencing. (*People v. Senior* (1995) 33 Cal.App.4th 531, 535.) Finally, claim (4) is not supported by the record. Indeed, the court explicitly stated that it did not base its decision to impose the upper term on the elements or the circumstances of the instant offense.

Separate and apart from appellant's contentions discussed above, we have also conducted a review of the record pursuant to *People v. Wende*, *supra*, 25 Cal.3d 436. Based on this review, we have concluded that no reasonably arguable legal or factual issues exist.

DISPOSITION

The judgment is affirmed.